

Copyright and Fair Use

Andrew T. Mirsky
Mirsky & Company, PLLC

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& COMPANY_{PLLC}

Andrew T. Mirsky, Esq.

- Principal, Mirsky & Company, PLLC, DC and NY
- Formerly in-house counsel with *National Journal* and *Atlantic Monthly* magazines
- Clients in new media and technology, including intellectual property, corporate and finance, privacy, joint ventures and partnerships, and employment and HR matters.

Copyright

Copyright - What IS Protected

- Novel.
- Computer software code.
- Video.
- Video game.
- Poem.
- Sound recording.
- Architectural work.

Copyright - *What is NOT Protected*

- Words, short phrases.
- Works in public domain (*Hamlet*, U.S. Government Publications).
- Titles.
- News.
- Facts.
- Ideas, Methods, Themes.

Fair Use

Fair Use

- Statutory defense to copyright infringement, 17 US Code §107.
- 4 nonexclusive factors to evaluate fair use:
 - Purpose and character of the use, including whether the use is of a commercial nature or for nonprofit educational purposes.
 - Nature of the copyrighted work.
 - Amount of the copyrighted work used.
 - Effect of the use on the potential market for or value of the copyrighted work.

Fair Use

Couching as “Commentary”

- Parody, satire, “commentary”, news reporting expressly covered as “fair use”.
- Perez Hilton big proponent of “commentary” aspect of fair use. Entertainment or commentary?
- Particular issue today with so much of content falling heavily in entertainment sphere.

Fair Use – Guidelines

- Copy only as much as you really need to make your point.
- Ask whether the “heart” of the original work is being used, regardless of the seemingly small physical amount of the copying.
- Add something new, and if it not be utterly original make it commentary, comparison of views, creativity in the selection and compilation ... another way of telling.
- When copying, if at all possible limit your use to facts and ideas, not original expression.
- Look at the nature of the original work, and be particularly careful when copying highly creative works like fiction and poetry, photographs, video and music.
- Facts are not always clearly public domain, especially in cases where unusual creative effort (e.g. proprietary market analysis algorithms) went into their compilation.

Editorial Uses

Editorial Uses

Warren Publishing v. Spurlock, 645 F. Supp. 2d 402 (EDPA 2009)

... whether the new work “merely supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; **it asks, in other words, whether and to what extent the new work is “transformative.”**

[Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

Editorial Uses

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4 nonexclusive fair use factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.*

Editorial Uses Inline Linking/Embedding

Perfect 10 v. Amazon.com

Perfect 10 v. Google Inc.

(US Court of Appeals, 9th Circuit, 2007)

Google Images Issue (inline linking):

<http://www.google.com/images?>

[hl=en&source=hp&biw=1153&bih=603&q=perfect+10&gbv=2&aq=f&aqi=g10&aql=&oq=](http://www.google.com/images?hl=en&source=hp&biw=1153&bih=603&q=perfect+10&gbv=2&aq=f&aqi=g10&aql=&oq=)

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Key Holdings:

Inline linking of images not copyright infringement

Thumbnail images “fair use” because
“transformative”

Applicability to videos? Embedding? Different story.
YouTube TOS.

Editorial Uses – Mashups

What is “transformative”? How much use is permitted?

- **Parody.** MoveOn.org mashup “Stop the Falsiness”, parody of Stephen Colbert’s “truthiness”. Colbert clips interspersed with commentary. <http://www.youtube.com/watch?v=sNHqX27hlz8>
- **Educational or Informational.** “A Fair(y) Use Tale”, a mashup made by a law professor to illustrate fair use, which includes famous Disney animation clips. http://www.youtube.com/watch?v=CJn_jC4FNDo
- **Commentary/Parody/Satire.** Mashup from 2008 Presidential debate with New England Patriots coach Bill Belichick. <http://www.centerforsocialmedia.org/fair-use/video/same-answers>
- **Parody.** MTV’s Movies Blog hilarious mashup with “Jersey Shore” star Angelina Pivarnick being substituted for Angelina Jolie in the film “The Tourist” <http://moviesblog.mtv.com/2010/12/10/tourist-trailer-mashup-angelina-pivarnick-jersey-shore>

Creative Commons

- <http://creativecommons.org/about/>
- Ease of Use
- Expands ability to use copyright protected material
- Basically creates a “public license” without losing your ability to own the copyright
- Decreases instances where fair use determination is necessary – **but does not limit fair use rights**

Fair Use Quiz

MIRSKY
& COMPANY PLLC

Andrew T. Mirsky

andy@mirskylegal.com

(202) 339-0303

www.mirskylegal.com